Docket No. 10,994.

United States Court of Appeals

FOR THE SIXTH CIRCUIT

EDWARD P. O'DONNELL,
UNITED STATES CASUALTY COMPANY,
Plaintiffs-Appellants,

vs.

GENEVA METAL WHEEL COMPANY,
Defendant-Appellee.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF FOR THE DEFENDANT-APPELLEE.

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JOHN W. McNEILL

BULKLEY, BUTLER & BINI,
JAMES A. BUTLER,
Bulkley Bldg., Cleveland, Ohio,
KENNETH D. CARTER,
N. B. C. Bldg., Cleveland, Ohio,
Attorneys for Defendant-Appellee.

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COUNTER-QUESTIONS.

1. Should a plaintiff's case claiming damages for personal injury from the separation of the discs of a wheel, alleged to have been defectively manufactured by defendant, be submitted to the jury when:

A. There is no positive proof that defendant manufactured the wheel;

B. Plaintiff O'Donnell made an unqualified settlement with his employers in consideration for $9,429.48 paid for his benefit by co-plaintiff United States Casualty Co.?

The District Court did not answer A or B above.

Defendant contends that A and B should be answered, "No."

2. Should a plaintiff's case claiming damages for personal injury from the separation of the discs of a wheel, alleged to have been defectively manufactured by defendant, be submitted to the jury when:

A. There is no proof that the wheel was defectively manufactured;

B. There is no proof that the discs separated because of a defect?

The District Court answered A and B, "No," which defendant contends is the right answer.



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COUNTER-STATEMENTS OF FACTS.

Edward P. O'Donnell and United States Casualty Company, plaintiffs, are the appellants in this court. Geneva Metal Wheel Company, defendant, is the appellee. Hereafter, we will refer to the parties as plaintiffs and defendant as they stood in the trial court.

Defendant cannot accept the statement of the question involved as prepared by plaintiffs. Defendant has prefixed counter-questions at the head of this brief.

Plaintiffs' brief sets forth a statement of facts which is reasonably accurate, but incomplete. There are several items which should be included.

Plaintiff was inflating the wheelbarrow tire which had a capacity of 60 pounds (R. 27), with an air hose from an unrestricted source (R. 60), having a pressure which varied between 120 and 180 pounds (R. 57, 60). The compressor

tank had a capacity of 500 pounds. The pump worked automatically. The safety valve was set at 200 pounds (R. 58). Plaintiff knew that the air hose he was using was connected to a tank having about 120 pounds pressure (R. 188, 189). There were two compressors and tanks connected by a valve. One supplied the car lifts, the other the air hoses (R. 58). The hoses in the yard outside were equipped with regulating control valves (R. 59). The hose used by O'Donnell had no control valve (R. 60). O'Donnell has no memory of what happened after the second time he gauged the tire (R. 182, 185).

Defendant's Model D C-285-P wheel is not patented (R. 13). It bears no name or number identifying the maker. The wheel is manufactured only for sale as a custom-made product to wheelbarrow manufacturers (R. 22), who incorporate the wheel as a component part of the finished product and prefer that there be no maker's name on the wheel (R. 23). The wheel is designed to take a pneumatic tire to be inflated to 60 pounds (R. 27). The manufacturer of the wheelbarrow orders the wheels made to his own specifications as to type of bearings, etc. (R. 36, 39). Each piece is individually inspected twice at each step of the manufacturing process (R. 37).

Two other wheel makers, Parish Stamping Co. and Dico Co., make similar wheels for use on wheelbarrows (R. 27, 219). Frank F. Branch, defendant's chief engineer, admitted that plaintiffs' Exhibits 1 and 2 were similar to Geneva's D C-285-P, but there was no definite proof to identify Exhibits 1 and 2 as products of the defendant.

Delbert Auten of the head office of Firestone Tire & Rubber Company examined plaintiffs' Exhibit 7, the tire alleged to have been on the wheel which plaintiff was inflating. He testified that the tire had been used for approximately 1,000 miles (R. 225). The tire was manufactured in the third quarter of 1941 (R. 218). It is evident that a wheelbarrow which has traveled 1,000 miles had been in service for a very long time.

Plaintiff claimed that defendant sold the wheel which injured him, to The Lansing Co., wheelbarrow makers (R. 4). The last wheel sold by defendant to The Lansing Co., before the plaintiff was hurt, was shipped May 19, 1942, approximately two years before the accident (R. 218).

Defendant never sold wheels to R. Perkins & Co. from whom plaintiff claims Wittig Coal Co. bought the wheel (R. 3, 218). Model D C-285-P was put on the market in 1939. From then until the date of accident, May 16, 1944, defendant sold 191,325 wheels of this model (R. 216). This is the only complaint of injury from this model (R. 217).

Auten also testified that he supervised tests of defendant's D C-285-P wheels conducted at the Firestone factory in Akron. These tests showed that the wheel halves separated at an average pressure of 150 pounds (R. 227, 249).

Plaintiff called two witnesses referred to as experts. One of these, Norman J. Beno, never saw disc wheels made (R. 102). The last time he was in a wheel factory was fifteen years before this trial (R. 101). He first saw the wheel which injured plaintiff about two months after the accident. He went to the gas station and picked it up July 20, 1944 (R. 72, 73).

Two discs, each constituting half the wheel, are held together by six hollow rivets, called ferrules. Beno testified that of the six ferrules one was thicker and, therefore, stronger than the other five. He made no test of the strength of any ferrule (R. 110). Beno assumed that the strongest ferrule was standard and that the other five were below standard in concluding that the ferrules were defective. On the assumption that the five were standard and that the stronger one was above standard, he testified that the wheel would withstand a pressure of 120 pounds (R. 110).

Beno claimed there were fractures in the ferrules. On cross examination he admitted that the fractures were so small they could not be seen with the naked eye and were

not visible until the ferrule rivet had been sawed in two (R. 108). He said that each time the shape of metal is changed, its strength is weakened and that the ferrules were weaker after the discs separated and straightened out the ferrules (R. 115, 116). His testimony was based wholly on conclusions from examinations made after the accident (R. 116).

Plaintiff's other professional witness, Bernard R. Krashin, first saw the wheel two days before the trial (R. 46), which was about five years after the accident. He made no test of the strength of any of the ferrules in the wheel which broke or in any similar wheel (R. 156, 157). He has never seen disc wheels assembled (R. 154). He admits that the ferrule would be weakened by the second bending when the wheel came apart (R. 154). He mentioned a circular fracture which was on the inside of the metal, visible neither to the naked eye nor with a magnifying glass (R. 152) until the ferrule was cut and photographed with magnification fifty times (R. 49, Ex. 9, 273).

O'Donnell had the wheel in his hands while repairing the tire. The wheel looked perfect to him (R. 180).

ARGUMENT.

1. Should a plaintiff's case claiming damages for personal injury from the separation of the discs of a wheel, alleged to have been defectively manufactured by defendant, be submitted to the jury when:

A. There is no positive proof that defendant manufactured the wheel?

The District Court did not answer A.

Defendant contends that A should be answered, "No."

Plaintiff claims in his amended complaint (R. 2-7) that the defendant manufactured a wheelbarrow wheel which it sold to The Lansing Company of Michigan, wheelbarrow makers; that R. Perkins & Co. of Chicago purchased the wheel from The Lansing Company; that Perkins sold it to the Wittig Coal Co., who brought it to the Grand Central Service Station for repairs to the tire.

Defendant's officers admitted that plaintiffs' Exhibits 1 and 2 were similar to wheel halves manufactured by defendant. Nevertheless there was no positive identification that they were made by the defendant. There was testimony that at least two other manufacturers made similar wheels. Defendant sold wheels to The Lansing Company, but there was no evidence that The Lansing Company sold wheels to Perkins. The defendant never sold wheels to Perkins.

The memo of sale (Ex. 23, R. 279) from Perkins to Wittig lists pneumatic wheels, furnishing no identification as to any maker or even the name of the tires mounted on the wheels. The District Court found that the plaintiff had not completed the chain of manufacture from the defendant to possession of the wheel by Wittig Coal Co. (R. 268).

It is fundamental that the defendant can have no responsibility for injury claimed to arise from a defectively made wheel without first establishing that the defendant made the wheel. Plaintiff did not furnish such proof. On that ground alone, defendant's motion for judgment was properly granted.

1. Should a plaintiff's case claiming damages for personal injury from the separation of the discs of a wheel, alleged to have been defectively manufactured by defendant, be submitted to the jury when:

B. Plaintiff O'Donnell made an unqualified settlement with his employers in consideration for $9,429.48 paid for his benefit by co-plaintiff United States Casualty Co.?

The District Court did not answer B.

Defendant contends that B should be answered, "No."

The final paragraph of the complaint alleges that co-plaintiff, United States Casualty Co., paid to O'Donnell on behalf of his employer, the Grand Central Service Station, $9,739.48 (R. 7). At the trial it was stipulated that this sum actually amounted to $9,429.48 (R. 188). This money was paid to O'Donnell under the terms of a settlement contract (Ex. 29, R. 281-286). O'Donnell was represented by counsel. He signed an unqualified release in favor of A. M. Coope and A. J. Nottoli d.b.a. Grand Central Service Station. He reserved no rights against the defendant or anyone else. The settlement contract was executed January 31, 1946. The action was commenced May 6, 1946.

2. Should a plaintiff's case claiming damages for personal injury from the separation of the discs of a wheel, alleged to have been defectively manufactured by defendant, be submitted to the jury when:

A. There is no proof that the wheel was defectively manufactured?

The District Court answered A, "No," which defendant contends is the right answer.

When plaintiff started to work on the tire, the wheel appeared to be normal. No defect was noticeable to O'Donnell who had it in his hands. Plaintiff called as his own witness Frank F. Branch, defendant's chief engineer. His

testimony revealed that defendant's operations were carefully conducted, including two inspections of each wheel half at each step of the manufacturing process. The ferrules are made of the same material as the discs. Plaintiffs' evidence of defect was confined to the testimony of Beno and Krashin and that was limited to the ferrules.

In essence, plaintiffs' experts found that of six ferrules in the wheel, one was heavier than the other five. They said the heavier one was stronger than the others. With no justification for doing so, they assumed that the heavier one was normal and that the other five were sub-normal. From this unjustified assumption, they concluded that the five ferrules were defective and that the wheel would withstand a pressure of about 40 pounds. This was based wholly on theory and not on any tests. Plaintiffs' expert admitted that if the five ferrules were normal and the heavier one above normal, the wheel would withstand a pressure of 120 pounds. In this complete absence of any proof whatever as to a defect at the time of manufacture, the District Court had no alternative but to grant defendant's motion for judgment. To do otherwise would be to invite the jury to speculate about a claimed defect concerning which there was no evidence. It is fundamental that courts cannot do that.

2. Should a plaintiff's case claiming damages for personal injury from the separation of the discs of a wheel, alleged to have been defectively manufactured by defendant, be submitted to the jury when:

B. There is no proof that the discs separated because of a defect?

The District Court answered B, "No," which defendant contends is the right answer.

Plaintiffs' experts never saw the wheel until after it had been violently ruptured by air pressure. It is not controverted that the air hose used by O'Donnell was attached to a tank of 500 pounds capacity supplied by an

electric, compressor pump controlled by an automatic switch. This was set to go on when the pressure got as low as 120 pounds and to go off at 180 pounds. Two connected tanks were the source of supply for the air hose used by plaintiff and for the car lifts in the greasing room of the service station.

Air hoses for customers in the yard outside had gauges enabling the user to set the pressure at any desired amount. The hose used by the tire repairman inside had no control valve. O'Donnell has no knowledge as to what happened. He says he twice applied air to the tire and gauged it each time. The tire still had less pressure in it than he desired. Grasping the air hose in one hand and the tire in the other, he remembers no more until he regained consciousness in the hospital two weeks later. It is highly probable that the discs separated from the application of excessive air pressure from a tank containing about 180 pounds. The evidence supplies no reason to conclude that the accident occurred under pressure of 25-30 pounds in the tire, as O'Donnell last gauged it.

Under these circumstances, with no proof as to the pressure in the tire at the moment of injury and with positive proof that O'Donnell had been applying air from an unrestricted source, the only reasonable conclusion that could be drawn is that excessive pressure caused the accident. There is nothing in the record to justify the conclusion that the wheel was defective.

LAW.

IMPLEMENT OF DANGER DOCTRINE.

Plaintiffs' brief cties numerous cases to support the proposition that a manufacturer who makes a defective product is responsible for injury sustained by an ultimate user of the product who has not been in privity with the maker. We agree with the holdings of the leading cases sustaining that proposition such as *Huset v. J. I. Case*

Threshing Machine Co., 120 F. 865, C. C. A. 8 (1903) and *MacPherson v. Buick Motor Co.*, 217 N. Y. 382 (1916). There is, however, an obvious difference between those and other cases holding to the same effect and the case at bar. A wheelbarrow wheel is not an implement of danger. It is not a device intended to preserve, destroy, or affect human health. Moreover, each of the cases referred to were brought against the manufacturer of the finished product rather than the maker of one of the component parts of the product. In *MacPherson v. Buick Motor Co., supra,* the court says:

> "We are not required, at this time, to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the component parts. To make their negligence a cause of imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in his duty of inspection. It may be that in those circumstances the negligence of the earlier members of the series is too remote to constitute, as to the ultimate user, an actionable wrong."

In our case, defendant did not put this wheel on the market for sale to the public. It was a custom-made product sold only to manufacturers of wheelbarrows. Unless the facts bring a case into the class of an implement of danger, or an article directly affecting human life, the general rule applies that there is no liability in favor of a user of a product, against a manufacturer with whom he is not in privity.

We agree with the general principle that litigants ordinarily are entitled to a trial by jury when an issuable question of fact is presented. Plaintiff has cited impressive authority to support that principle. However, it is equally well established that when, under the law applicable to a case, the plaintiff has no legal cause against the defendant, the court is obliged to take the case from the jury and not permit the jury to speculate with the rights of litigants. That holding was clearly announced by the Ohio Supreme

Court in the case of *The J. C. Penny Co., Inc. v. Robison,* 128 O. S. 626 (1934).

Mrs. Robison slipped on the floor of the Penny store. She claimed that it had been improperly oiled and made dangerously slippery. She offered no evidence that the oil was not carefully applied and based her claim of negligence essentially on the fact that she slipped and fell. At pages 634, 635 of the opinion, the court said:

> "We agree that the right of trial by jury is guaranteed to all citizens by the Constitution of Ohio, and it cannot be invaded or violated by legislative act or judicial decree; but all this does not mean that all cases, regardless of evidentiary aspect, must be submitted to a jury. Under our law it is just as pernicious to submit a case to a jury and permit the jury to speculate with the rights of citizens when no question for the jury is involved, as it is to deny to a citizen his trial by jury when he has the right."

The Ohio Supreme Court reversed the judgment of the lower court and entered judgment in favor of the defendant Penny Co.

CHOICE OF PROBABILITIES.

We believe that the law applicable to the instant case is well stated in some leading decisions of this Sixth Circuit Court of Appeals. When the plaintiff's evidence at best presents to the jury only a choice of probabilities then the plaintiff has not made a case to be submitted to the jury for consideration. We call attention to *Parker v. Gulf Refining Co.,* 80 F. 2d 795, C. C. A. 6 (1936). The first syllabus reads:

> "Evidence which presents no more than choice of probabilities or which requires superposing of inferences is not substantial evidence for submission to jury."

We also cite *E. I. du Pont de Nemours & Co. v. Wright,* 146 F. 2d 765 (1944) wherein the court at pages 768, 769 said:

"We have had many occasions to apply the rule that evidence is not substantial to carry a plaintiff's burden of proof where the result is to submit to a jury a mere choice of probabilities. This but permits them to conjecture or guess at the manner of an accident or the presence of negligence. Parker v. Gulf Refining Co., 6 Cir., 80 F. 2d 795; Toledo, etc., R. Co. v. Howe, 6 Cir., 191 F. 776, 782; Virginia & S. W. R. Co. v. Hawk, 6 Cir., 160 F. 348, 352; Davlin v. Henry Ford & Son, 6 Cir., 20 F. 2d 317."

We also call attention to the case of *Pennsylvania Railroad Co. v. Chamberlain,* 288 U. S. 333 (1933). A brakeman was killed in a switch operation in the railroad's classification yards. Plaintiff alleged that the decedent was injured by reason of a violent contact between two cuts of cars. Several witnesses, in a position to see, said there was no contact between the cuts of cars. Plaintiff produced a witness who testified to a loud noise, and that from a distance of 900 feet he saw the two cuts of cars apparently traveling together. The District Court instructed the jury to return a verdict in favor of the defendant railroad. The Supreme Court affirmed the judgment in favor of the railroad. We quote from the opinion at pages 339, 340:

"We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. * * *

"The rule is succinctly stated in Smith v. First Nat. Bank, 99 Mass. 605, 611, 612, 97 Am. Dec. 59, quoted in the Des Moines Nat. Bank Case (C. C. A. 8th) 145 Fed. 273, supra:

" 'There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in find-

ing that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.' "

In the case at bar plaintiff attempts to reason backward from the fact of injury to prove that something must have been wrong with the wheel. We believe plaintiff's evidence is totally inadequate to show even by a scintilla that the defendant was negligent. On the contrary, the evidence is uncontroverted that the air hose used by plaintiff had a pressure between 120 and 180 pounds. There is not merely an equal possibility, there is a far greater probability that the excessive air pressure caused the discs to separate, rather than defective manufacture.

NO DANGER FORESEEN.

Defendant had no reason to anticipate that in the normal use of its wheels anyone would be hurt. The wheel was not being used for the purpose intended when this accident occurred. Nothing went wrong with the wheel to require repairs. The tire after 1,000 miles of travel became punctured. In the course of repairing and inflating the tire by means of an air hose without pressure controls, the accident happened. Those circumstances could not reasonably have been foreseen by the maker of the wheel as likely to occur in normal use by an ultimate purchaser.

An interesting case dealing with this question of foreseeability is that of *Borg-Warner Corporation v. Heine*, 128 F. 2d 657, C. C. A. 6 (1942). Borg-Warner manufactured the Norge refrigerator which was sold to a wholesale distributor who re-sold it to a department store. It was ultimately purchased by a householder. The refrigerator did not work properly. The department store sent the plaintiff, a service man, to repair it. Heine discovered that

a metal valve regulating the flow of sulphur dioxide was stuck. As he removed the valve, sulphur dioxide gas which had collected at that point due to an obstruction negligently left in the line, escaped and injured plaintiff. The Circuit Court reversed the Trial Court and ordered that judgment be entered for defendant. At page 658 this Court said:

> "The general rule is that the manufacturer of an article is not liable to third parties, who have no contractual relations with him, for negligence in the construction of the article. The proposition is elementary and needs no citation of authority to support it. Its soundness is conceded."

The court then discusses an exception to the rule applicable to products imminently dangerous to life or health or intended to preserve, destroy or affect human health. *MacPherson v. Buick, supra,* is commented on and distinguished. The court then said at page 659:

> "We must assume that the regrigerator was defectively constructed in that the solder wholly or partially restricted the flow of gas through the tube, but even so, it gave no warning that it would be dangerous in its normal use. Schfranek v. Benjamin Moore & Co., D. C., 54 F. 2d 76; and was not dangerous in its use as a refrigerator. It was not dangerous at all until appellee pulled the needle valve. There is no evidence that appellant knew of the defect. As was said in the MacPherson case, there must be knowledge of a probable danger. In the absence of such knowledge, appellant could not reasonably foresee danger from a service man pulling the needle valve."

Another case on this point is *Schindley v. Allen-Sherman-Hoff Co.,* 157 F. 2d 102, C. C. A. 6 (1946). Schindley was injured when a heavy furnace gate manufactured by defendant went past the stopping mechanism and fell on him. The court found that about 2,000 of these gates had been installed and that there had been no complaint about the mechanism or any defect in the gate which injured plaintiff. An examination disclosed that lugs had become

bent so that they did not engage the gate and stop its forward movement. The court referred to the general rule that a manufacturer is not liable to third parties who have no contractural relations with him for negligence in the construction of an article. At page 104 of its opinion the court said:

> "We think that appellant's case falls under the general rule rather than under any of its exceptions. There is no evidence that the stopping arrangement was 'imminently dangerous' at the time it was fabricated and installed. At that time it was not 'essentially,' 'per se' or 'necessarily' a dangerous instrumentality. It was not 'in its nature hazardous' or 'inherently dangerous.' See the cases cited in the Borg-Warner opinion, supra, 128 F. 2d at page 659."

SOME REASONS SURPLUSAGE.

Appellant's counsel seizes upon certain phraseology used by the Trial Court in its opinion granting defendant's motion for judgment. It is evident that the District Judge was convinced that plaintiff had utterly failed to sustain the burden of proof. There was no evidence definitely linking the defendant as maker of the wheel which injured plaintiff. At best that essential fact could be established only by inference. There was absolutely no evidence that the defendant knew or could have known of any defect in the wheel, at the time of its manufacture. The wheel had traveled 1,000 miles and if it was made by the defendant, had been sold at least two years before plaintiff was hurt.

The manufacturer had no reason to anticipate that in the normal use of this wheel in a wheelbarrow, a repair man working on a tire he intended to inflate to 48 pounds, would use an uncontrolled air supply from a tank containing 180 pounds. The Trial Court's ruling was correct. His comment that the opinions of plaintiff's experts did not outweigh defendant's evidence may properly be regarded as surplusage and not the basis for the ruling. A

sufficient reason for the court's judgment was assigned when he said (R. 268):

> "Five years after the event this court is called upon to extend the 'Implement of Danger' doctrine to a case where the manufactured article was not essentially dangerous. Certainly substantial evidence of an affirmative character ought to be presented, and required, to justify jury consideration. Unless the court should decide in this case to allow the jury to speculate on the proximate cause of the failure of the wheel, I cannot bring myself to find that the plaintiff has carried the burden of proof."

The judgment of the District Court should be affirmed.

Respectfully submitted,

JAMES A. BUTLER,

KENNETH D. CARTER,

Attorneys for Defendant-Appellee.